In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence derived from monitoring petitioner's illegal radio transmissions must be suppressed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*

2. Whether the government violated petitioner's right to due process or to compulsory process by deporting a 17-year old illegal alien witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17a–24a) is reported at 669 F.2d 23. The amended opinion of the court of appeals (Pet. App. 25a–26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1982. A petition for rehearing was denied on March 15, 1982. The petition for a writ of certiorari was filed on May 17, 1982, and therefore was out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 963 (Count 1), possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 955(a) (Count 3), and conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count 4). He was sentenced to concurrent terms of five years' imprisonment on each count, to be followed by a three-year special parole term on Count 3. The court of appeals affirmed (Pet. App. 17a–24a).

1. The facts as set forth in the opinion of the court of appeals (Pet. App. 17a–26a) and the magistrate's memorandum (Pet. App. 1a–7a) are as follows. On October 29, 1980, King Hall, a Federal Communications Commission (FCC) employee, intercepted, in the normal course of his employment, a suspicious radio transmission (*id.* at 1a). The transmission was a point-to-point broadcast—some of it in code—on the "ham" radio operator's frequency, originating from and being sent to points at sea off the Atlantic coast (*id.* at 2a). The radio frequency used, however, was limited under the FCC regulations to transmissions on land.

Hall monitored the intermittent transmissions for approximately five hours and concluded that the transmissions were referring to contraband trafficking (Pet. App. 18a). FCC officials then turned the information Hall had accumulated over to the United States Coast Guard, and it began to monitor the transmissions. The Coast Guard determined that the transmitting parties were arranging some sort of rendezvous off Cape Cod and Georges Bank (*id.* at 2a, 18a).

On October 30, 1980, the Coast Guard cutter *Alert* proceeded to the suspected "drop site" (Pet. App. 3a, 18a). As it approached the rendezvous point, the com-

mander of the *Alert* observed two vessels side by side, transferring what appeared to be bales of marijuana from one vessel to the other. When the officers on the *Alert* identified themselves and ordered the vessels to stand by to receive a boarding party, the people on board the two vessels began throwing bales overboard. In addition, one vessel, the *Judith Lee Rose*, attempted to escape. The vessel stopped, however, when the Coast Guard fired a machine gun blast across her bow (*ibid.*). Petitioner and eight others were arrested on board the *Judith Lee Rose*. Thirteen aliens were arrested on the second vessel, the *Diana Cecelia*.

2. In the district court, petitioner moved to suppress all statements made by him over the radio and all of the marijuana seized[1] on the ground that the monitoring of the radio transmissions was in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. IV) 2510 *et seq.*[2] Adopting the findings of the magistrate, the district court found that the radio transmissions were not protected oral communications within the meaning of 18 U.S.C. 2510, because petitioner lacked both a subjective and objective expectation of privacy (Pet. App. 13a–14a). Further, the court found that the interception of the transmission by the FCC employee was made in the normal course of his employment and in discharge of the FCC's monitoring responsibilities in accordance with the ex-

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[1] A total of 256 bales of marijuana were seized from the two vessels.

[2] 18 U.S.C. 2510(2) provides:

> "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

ception to Title III delineated in 18 U.S.C. 2511(2)(b) (Pet. App. 14a).[3] Accordingly, the court concluded that the disclosure of the transmissions to law enforcement authorities was proper (Pet. App. 12a–16a).

Petitioner also moved in the district court to dismiss his indictment on the ground that he had been denied his rights to compulsory process and due process when the Immigration and Naturalization Service deported to Colombia a 17-year old illegal alien—Edgar Danies-Ocampo—who had been arrested on board the *Diana Cecilia*. The United States Attorney decided not to prosecute him because of his age and therefore turned him over to immigration officials, who returned him to Colombia shortly thereafter. He spoke no English, and no inquiry was made by the government as to his value as a witness. The district court concluded that petitioner had failed to show any possible prejudice caused by the deportation of Danies-Ocampo and, accordingly, denied the motion to dismiss (Pet. App. 8a–12a).

3. The court of appeals affirmed (Pet. App. 17a–24a). It held that the federal wiretapping statute protects radio transmissions only when the speaker has a subjective expectation of privacy that is objectively reasonable (*id.* at 17a–20a). The court upheld, as supported by the evidence, the district court's finding that petitioner had no actual expectation of privacy and also held that the use of a radio in this case made it objectively unreasonable for petitioner to expect that his

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[3] 18 U.S.C. 2511(2)(b) provides:

> It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

words would be heard only by the target of his communication (*id.* at 20a–21a). Thus, the court held that no evidence was obtained in violation of Title III.[4]

The court also held that the deportation of Danies-Ocampo before petitioner's counsel had an opportunity to interview him did not violate petitioner's rights (Pet. App. 23a–26a). It found, in response to petitioner's petition for rehearing, that the government's decision to deport was not intended to deprive petitioner of any evidence and that petitioner had failed to show how the missing alien "would have been likely to offer meaningful evidence not obtainable from other available witnesses" (*id.* at 26a).

ARGUMENT

1. Petitioner contends (Pet. 8–11) that the courts below should have granted his suppression motion because the intercepted point-to-point radio transmissions were protected communications under the federal wiretap statute, and therefore the FCC's monitoring and disclosure to the Coast Guard of the transmissions were forbidden. The court of appeals, however, properly interpreted the wiretap statute as not protecting petitioner's transmissions.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 applies only to "wire" or "oral" communications. See 18 U.S.C. (& Supp. IV) 2511. Petitioner's radio transmissions could only be oral communications, which are protected under the statute only if "uttered by a person exhibiting an expectation that such communication is not subject to interception under

[4] Because the court of appeals concluded that Title III did not apply to petitioner's radio transmissions, it did not consider the district court's alternative holding that the FCC's monitoring in this case complied with the exception to the prohibitions in Title III for FCC monitoring contained in 18 U.S.C. 2511(2)(b).

circumstances justifying such expectation." 18 U.S.C. 2510(2). As the court of appeals correctly held (Pet. App. 19a), the statute's protection is limited to communications satisfying two independent requirements: the speaker must have an actual, subjective expectation of privacy, and that expectation must be objectively reasonable. See, *e.g.*, *Holman* v. *Central Arkansas Broadcasting Co.*, 610 F.2d 542, 544–545 & n.3 (8th Cir. 1979); *United States* v. *McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 89–90 (1968). Petitioner's transmissions satisfied neither requirement.

With regard to his subjective expectation, petitioner argues (Pet. 9) that his use of a code to conceal the nature of his conversation was an insufficient basis for the courts below to conclude that he lacked an actual expectation of privacy. Petitioner does not challenge the use by the court of appeals (Pet. App. 20a) of the "clearly erroneous" standard for reviewing the district court's finding on this issue. Instead, he argues that the court improperly emphasized his use of a code during the transmissions. But the use of a code is clearly probative of whether petitioner expected his transmissions might be overheard. Moreover, the court of appeals also relied upon petitioner's failure to identify himself or his station and his periodic switching of frequencies during his transmissions as additional, strong evidence in support of the district court's finding on this issue. Neither court committed error in this regard, and, in any event, whether the finding of the district court on the issue of subjective expectation was clearly erroneous is not an issue warranting review by this Court.

Petitioner also had no reasonable expectation of privacy in these illegal transmissions. He argues (Pet. 10) that the court of appeals erred in holding that simply because his radio transmissions could be intercepted no reasonable expectation of privacy attached to them. Pe-

titioner, however, ignores the crucial fact that his transmissions were illegal. He was using land-restricted frequencies to make point-to-point communications at sea. In order for any reasonable expectation of privacy to attach with respect to private radio communication, at a minimum "the voice must be legally on the air; otherwise one who hears and especially the Federal Communications Commission, may make full disclosure." *United States* v. *Sugden*, 226 F.2d 281, 285 (9th Cir. 1955), aff'd, 351 U.S. 916 (1956).[5]

2. Petitioner further claims (Pet. 12–13) that his rights to due process and compulsory process were violated by the return to Colombia of a juvenile illegal alien who was a participant in the smuggling operation. The decision of the court of appeals, however, is completely consistent with this Court's recent decision in *United States* v. *Valenzuela-Bernal*, No. 81–450 (July 2, 1982), and therefore warrants no review by this Court.

In *Valenzuela-Bernal*, this Court considered the identical issue raised by petitioner and held that no constitutional rights are violated if the government acts in good faith in exercising its statutory duty to deport illegal aliens promptly, unless the defendant can make a "plausible showing" that the deported witnesses would

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[5] The court in *United States* v. *Sugden*, *supra*, was interpreting 47 U.S.C. 605, which is a forerunner of Title III. Petitioner argues (Pet. 10–11) that under Section 605, which he claims is broader than Title III, his transmissions were protected. First, as the court of appeals held in this case, Section 605 begins with the phrase "'[e]xcept as authorized by [Title III],'" and therefore its protection is coextensive with Title III (Pet. App. 21a–22a). Second, even assuming that Section 605 does protect oral communications more broadly than Title III, *Sugden* makes clear that even under Section 605 petitioner's "outlaw broadcasts" are entitled to no protection. 226 F.2d at 285.

supply non-cumulative testimony that is sufficiently material and favorable to the defendant to create a "reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *United States* v. *Valenzuela-Bernal*, *supra*, slip op. 14–15.

The court of appeals in this case accurately anticipated this Court's decision in *Valenzuela-Bernal*. Initially, it considered the government's motive in deporting the illegal alien and found that it was motivated strictly by a humanitarian desire to return the juvenile promptly to his own country. See *United States* v. *Carrillo-Frausto*, 500 F.2d 234, 235 (9th Cir. 1974). The court then considered whether petitioner had been prejudiced by the deportation of this single witness. It concluded that petitioner had been unable to "show that the deported witness would have been likely to offer meaningful evidence not obtainable from other available witnesses." Pet. App. 26a; *United States* v. *Avila-Dominguez*, 610 F.2d 1266, 1270 (5th Cir. 1980). Since this standard is at least as protective of petitioner's rights as that adopted in *Valenzuela-Bernal*, the decision warrants no review by this court.[6]

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[6] The determination by the court of appeals that there was no prejudice to petitioner is clearly correct. Petitioner speculates (Pet. 12–13) that the deported witness might have been able to provide evidence concerning the search, the destination of the cargo or the extent of petitioner's participation in the charged crimes. However, the deported alien was not travelling on the same ship as petitioner, nor was he present when the arrests and search took place aboard the *Judith Lee Rose*, because that ship had fled the scene when the Coast Guard approached. Also, he was the only person deported out of the 21 people arrested on board the two ships. Petitioner has made no showing at all as to what, in particular, the non-English speaking 17 year old could have stated that was not available through other witnesses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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